The Charlottetown Agreement

A *Saskatchewan* Perspective

Constitutional Unit
Saskatchewan Justice

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Introduction

The Charlottetown Agreement is a consensus for constitutional renewal reached among federal, provincial, and territorial governments, and representatives of Canada's Aboriginal peoples. It is the most comprehensive constitutional package since Confederation in 1867, and as such is of historic significance.

The Charlottetown Agreement is the result of an extensive consultation process which took place throughout Canada over the last two years. This process is often referred to as the "Canada Round" of constitutional reform because it dealt with issues of concern to all Canadians in all parts of the country. Various federal, provincial, and aboriginal task forces and commissions conducted public hearings on constitutional reform during this time. Recommendations from these public forums provided the foundation for the Multilateral Meetings on the Constitution (MMC).

The MMC process began with a meeting in Ottawa on March 10, 1992. At this meeting, the federal government, nine provincial and two territorial governments and four national aboriginal organizations agreed to undertake a multilateral negotiation process on constitutional renewal. They set a "best efforts" deadline of May 31, 1992.

The federal Minister of Constitutional Affairs, Premiers or Ministers of Constitutional Affairs from all provinces and territories with the exception of Quebec, and Aboriginal leaders attended the MMC. Four working groups of officials from these governments and the aboriginal organizations studied reform proposals and developed options and recommendations for consideration by First Ministers, Ministers and Leaders. Areas examined by the MMC process include the formulation of a Canada Clause, the constitutional amending formula, Senate reform, inherent aboriginal rights and treaty rights, the social and economic union, and the division of powers

The MMC process was intensive and lengthy. Weekly meetings were held in seven Canadian cities, commencing in April. Significant progress was made by the May 31 deadline, and in an effort to reach a consensus, meetings were subsequently extended into June, and then July. The MMC process produced the "Pearson Accord" of July 7. The Pearson Accord was the consensus reached on all major issues by the federal government, nine Premiers, two territorial leaders, and the heads of four national aboriginal organizations.

It was at this point that Quebec rejoined the constitutional reform process. Four additional meetings were held in the month of August at Harrington Lake, Ottawa, and Charlottetown, culminating in unanimous agreement in Charlottetown.

Saskatchewan entered the MMC negotiations guided by several goals. First and foremost, Saskatchewan sought to keep Canada intact as a country, an objective shared by all MMC participants. At the same time, Saskatchewan took the position that it would not pursue the attainment of this goal at any price.

Saskatchewan did not want a federal government too weak to perform necessary functions such as national economic development and national coverage of essential

social programs such as medicare. A massive devolution of powers from the federal government to the provinces was unacceptable, but so too was a major transfer of provincial power to the federal government or the courts.

Saskatchewan's concerns are reflected in the Charlottetown Agreement. Canada will continue to have a strong central government. But it will not be a domineering central government. Instead, the Agreement achieves balance and flexibility. Proposals to constitutionally "strengthen the economic union" were rejected because they were highly centralist in nature, and would have created an unequal playing field between the federal and provincial governments regarding economic management. In addition, they would have transferred important powers from our elected legislature to the judiciary. The Constitution will recognize exclusive provincial jurisdiction in a number of economic fields, but provinces will be able to negotiate agreements with the federal government to suit their particular needs and circumstances.

With respect to the federal government's use of its spending power in areas of exclusive provincial jurisdiction, Saskatchewan sought a balance between provincial jurisdiction over social programs and the merits of national programs. A balance would ensure the preservation of national standards while allowing provinces to design programs suited to their particular needs.

The sections of the Charlottetown Agreement which deal with the federal spending power are consistent with the position taken by the Government of Saskatchewan at the beginning of negotiations. There will be restrictions on the federal spending power in areas of exclusive provincial jurisdiction. A province may also opt-out of any new shared-cost program established by the federal government in an area of exclusive provincial jurisdiction. However, in order to receive any federal money to help pay for its program, the province opting-out must carry on a program that is compatible with national objectives.

In keeping with its position that a constitutional agreement should not be achieved at any price, Saskatchewan advocated changes which would ensure equal treatment of different parts of the federation. Saskatchewan acknowledged that the recognition of equality of the provinces had to respect provincial differences.

Saskatchewan's position on equal treatment was reflected in its support for a democratically elected and effective Senate with an equal number of Senators from all provinces. Such a Senate is contained in the Agreement. Saskatchewan's position is also reflected in the province's acceptance of a new constitutional mechanism for protecting intergovernmental agreements. All provinces must be treated equally. Saskatchewan also supported the inclusion in the Canada Clause of the principle of the equality of the provinces, and the recognition, at the same time, of their diversity.

In addition to examining proposals in relation to the goal of keeping Canada together, Saskatchewan analyzed constitutional proposals in light of their ability to contribute to the economic, social, and political goals of the people of Saskatchewan. These goals included strengthening the province's economy, strengthening the government's ability

to deliver social programs, and strengthening the fiscal capacity of the provincial government. Success here would not only benefit Saskatchewan, it would also strengthen federal-provincial cooperation and thus the unity of the country as a whole.

Saskatchewan therefore sought to strengthen the federal commitment to equalization payments, in order to give less affluent provinces the revenues to pay for public services. Saskatchewan responded favourably to proposals that committed governments to the promotion of regional economic development to reduce economic disparities. Saskatchewan also supported provincial control over aspects of telecommunications within the province, in order that SaskTel could continue as a tool for economic development.

Again Saskatchewan's priorities are reflected in the Charlottetown Agreement. The Agreement contains a strengthened federal commitment to equalization, and a federal commitment to seek the views of provinces before making changes to the equalization formula. All governments will be committed to promoting economic development in order to reduce regional disparities. And the federal government will negotiate an agreement with Saskatchewan to coordinate and harmonize the procedures of their respective telecommunications regulatory agencies.

These amendments will strengthen the ability of all governments to encourage economic development and to deliver vital social programs.

Another principle guiding Saskatchewan was that the "Canada Round" had to include a recognition of the rightful place of all Aboriginal peoples within the Canadian federation. Thus Saskatchewan endorsed constitutional amendments to recognize and implement the inherent right of Aboriginal peoples to govern themselves.

The amendments about Aboriginal peoples recognize their inherent right to govern themselves and provide for an orderly process of negotiations between Aboriginal peoples and the federal and provincial governments. Equity of access to the negotiation process will be guaranteed for all Aboriginal peoples: Indian, Inuit, and Métis. Courts will be able to enforce the inherent right after five years. This delay will permit a smooth transition towards the exercise of the inherent right. A new process will be established to clarify and implement treaty rights. As well, federal legislative power will state clearly that it covers Métis people in the same manner as Indians and Inuit.

Many will point out that the Charlottetown Agreement is not a "perfect" document. But successful attempts at constitutional renewal in a large country with many diverse components depends upon give and take from all sides. Canada was created 125 years ago as a result of many compromises between the founding provinces. Similarly, the Charlottetown Agreement of August 28, 1992, would not have been possible without a strong spirit of compromise on the part of all participants. Good compromise is not about abandoning principles, good compromise is about respecting the principles of others.

It was in Charlottetown where the first meetings were held to discuss the union of the British North American colonies in 1864. It is fitting that the birthplace of Confederation was the site of the Charlottetown Agreement.

The Canada Clause

Over the past few years, Canadians have engaged in considerable discussion about how to describe the "fundamental characteristics" of Canada. A significant portion of the Spicer Commission Report dealt with what it means to be a Canadian. The Report of the Task Force on Saskatchewan's Future in Confederation outlined the views held by Saskatchewanians about what constitutes the elements of the Canadian identity.

Preambles in current constitutional enactments refer to the "Supremacy of God" (1982), the "Rule of Law" (1982), and the similarity in principle between the Constitution of Canada and Great Britain (1867). There is no reference, however, to the fundamental characteristics of Canada or to the values shared by Canadians.

The Charlottetown Agreement includes a "Canada Clause" to be placed in the body of the Constitution.

The Fundamental Characteristics

The first section of the Canada Clause outlines eight fundamental characteristics that will guide the courts in their future interpretation of the entire Constitution, including the *Canadian Charter of Rights and Freedoms.* These fundamental characteristics are:

- Canada is a parliamentary democracy with a federal system of government;
- Aboriginal people, as the first people to govern this land, have the right to promote their languages, cultures, and traditions, and to ensure the integrity of their societies, and their governments constitute one of three orders of government in Canada;
- Quebec is a distinct society, which includes a French-speaking majority, a unique culture, and a civil law tradition;
- Canadians and their governments are committed to linguistic duality;
- Canadians are committed to racial and ethnic equality and cultural diversity;
- Canadians are committed to respect for individual and collective human rights and freedoms of all people;
- Canadians are committed to equality of women and men; and
- Canadians are committed to the equality of provinces, while recognizing their diverse characteristics.

Distinct Society

As well, the Canada Clause affirms the role of the legislature and Government of Quebec to preserve and promote its distinct society. At the same time, however, another provision explicitly says that nothing in the Canada Clause, including the distinct society portion, takes away any existing powers of Parliament or the provincial legislatures.

Nor will the Canada Clause take away any powers of the legislative bodies or governments of Aboriginal peoples, or any aboriginal or treaty rights.

Central Institutions

In democratic states, the institutions of national government exist to give expression to the views and aspirations of the citizens who collectively constitute the state.

Canada's current institutions of national government have existed in much their present form since 1867. However, Canada also has a federal system of government and the Canadian federation has grown and evolved in numerous ways. The Charlottetown Agreement proposes reforms to national institutions to take account of these changes so that our institutions of national government represent all Canadians in a fair and balanced manner.

Central institutions in any federal state must strike a balance between two principles: first, the democratic principle of equality of individual citizens; and second, the federal principle of equality of the constituent units (provinces) of the federation. Representation by population in the House of Commons recognizes the equality of individual citizens. Changes to the House of Commons will more accurately reflect representation by population and thus further the equality of individuals. The reformed Senate will recognize the equality of the provinces.

The Senate

An Equal Senate:

The new Senate will have 62 seats. Each province will have six seats, and each territory will have one.

An equal Senate represents an important achievement for provinces like Saskatchewan. By giving equal representation to all provinces, the new Senate will help to address the concern of smaller provinces that their voices are not often heard in national decision-making. And, by enhancing the ability of smaller provinces to advance their concerns, the equal Senate will better include those provinces in the federation, thus reducing regional alienation and unifying the country.

An Elected Senate:

New Senators will be elected either directly by the electors of each province and territory or indirectly by the members of the provincial or territorial legislative assembly.

Senate elections will be guided by federal legislation and will take place at the same time as elections to the House of Commons. The federal legislation will allow each province to make its own decisions on matters such as gender equality in the composition of the Senate.

An Effective Senate:

The reformed Senate will exercise four different types of powers, each applicable to a specific type of legislation:

1. Supply Bills (Bills relating to the government's financial ability to carry out its day-to-day operations): The Senate will possess the power to hold up House of Commons legislation for 30 days. After 30 days, the House of Commons can override Senate objections by re-passing the Bill in question.

This power is called a suspensive veto. It ensures that the day-to-day operation of government cannot be paralysed by an elected Senate.

And, because the new Senate will thus not be able to defeat a government supply bill, the Senate is not a "confidence chamber" — no general election can be forced by a Senate vote against the government.

2. Bills that would result in fundamental tax policy changes directly relating to natural resources: The Senate will possess an absolute veto by a simple majority of Senators voting. Thus, the House of Commons cannot override the Senate's defeat of a Bill in this category.

The absolute veto power over the taxation of natural resources will encourage the federal government and the House of Commons to craft legislation which is sensitive to western concerns about resource development and economic growth.

3. Bills materially affecting the French language and culture: Bills of this type will require the approval of a majority of all Senators voting, as well as a majority of francophone Senators voting.

The double majority provision offers some protection to Canada's francophone minority in relation to matters affecting their language and culture.

4. All Other ("Ordinary") Legislation: A vote to reject ordinary legislation in the Senate will trigger the convening of a joint sitting of the House of Commons and the Senate to reconsider the Bill. A simple majority vote at the joint sitting will determine whether the Bill is passed or defeated. In a joint sitting, each Senator and Member of the House of Commons will have one vote.

The joint sitting seeks to reconcile the federal principle of the equality of the provinces with the democratic principle of representation by population. The mechanism of a joint sitting acknowledges that when the population-based chamber (House of Commons) feels very strongly about a particular issue being disputed by the federal chamber (Senate), the House of Commons should normally, in the end, prevail.

The power of the reformed Senate over ordinary legislation is mainly a political one. By rejecting a Bill, the Senate sends a strong message to the government of the day. In all likelihood, a government will be very hesitant to override frequently the views of the elected Senate.

In addition to its powers over legislation, the Senate will play an important role in the ratification of certain federal appointments.

The Senate will have an absolute veto in approving the appointment of important officials such as the Governor of the Bank of Canada, as well as any heads of national cultural institutions, and federal boards and regulatory agencies that are designated by Parliament. Federal legislation will set out the specific appointments that will be subject to Senate approval.

The absolute veto will ensure that appointments to important national boards and agencies are made in a way that is attentive to the concerns of all provinces.

Finally, in addition to its power over legislation originating in the House of Commons, the Senate will possess the important power of being able to initiate all types of legislation, other than supply bills. The House of Commons will be required to consider Senate bills within a specified period of time. Amendment or rejection of a Senate bill by the House of Commons will, again, automatically trigger the joint sitting process already discussed.

The House of Commons

The composition of the House of Commons will be adjusted to reflect more accurately the principle of equality of individual citizens by adhering more closely to true representation by population.

The House will immediately increase in size from 295 to 337 members. The size of the Senate will decrease from 104 Senators to 62. Since the reduction of the size of the Senate will occur at the same time as the expansion of the House of Commons, the overall size of Parliament will not change.

Ontario and Quebec will each gain 18 House of Commons seats. Both provinces would have gained a substantial number of these seats even in the absence of a constitutional agreement as a result of the regular redistribution of Commons seats in the near future.

British Columbia will receive four seats, and Alberta two as a result of the partial immediate shift towards a more accurate reflection of representation by population in the House of Commons.

During the immediate move towards accurate representation by population, Saskatchewan has been guaranteed that it will not lose any of its present House of Commons seats.

Quebec will be guaranteed a floor of 25% of the seats in the House of Commons. Quebec currently has 25.3% of the population of Canada, and Statistics Canada projections show that Quebec's proportion of the Canadian population will remain at or above 25% well into the next century.

Right now, this provision is mainly symbolic. It acknowledges Quebec's status as the historic representative of one of Canada's two founding linguistic communities.

The Supreme Court of Canada

Entrenchment:

The Supreme Court of Canada was established and is maintained by an Act of the federal Parliament. The Charlottetown Agreement puts this important institution on a more permanent footing by entrenching it in the Constitution as the general court of appeal for Canada.

Composition:

The *Supreme Court Act* currently provides that the Supreme Court is to be composed of nine judges, three of whom must be from the Quebec bar. The three judges from Quebec rule ensures that there is sufficient expertise on the Court to deal with cases which originate from Quebec's distinctive civil law tradition.

The current provisions dealing with the Supreme Court's composition will be entrenched in the Constitution.

Nominations and Appointments:

Appointments to the Supreme Court are currently made by the federal government acting alone. This is somewhat unusual, given that Canada is a federal state and that the Supreme Court is the final arbiter of jurisdictional disputes between the two constitutionally established orders of government.

The Charlottetown Agreement establishes a process which will provide a better federal-provincial balance in the process of nominating and appointing Supreme Court judges. The federal government will be required to appoint judges from lists which are submitted by the provinces and territories.

First Ministers' Conferences

The Constitution will require that the Prime Minister convene a First Ministers' Conference at least once a year. The leaders of the Yukon and the Northwest Territories will be invited to attend.

In addition, representatives of Aboriginal peoples will be invited to attend those First Ministers' Conferences during which matters directly affecting Aboriginal peoples are under discussion.

This amendment will help to ensure an ongoing dialogue between governments.

Aboriginal Rights

The Charlottetown Agreement contains a number of provisions relating to Aboriginal peoples. Among them are provisions relating to self-government but also included are amendments relating to treaty interpretation and implementation, the Métis, aboriginal involvement in future constitutional conferences, aboriginal involvement in central institutions, and aboriginal consent to constitutional change affecting aboriginal rights.

An Inherent Right to Self-Government

The constitutional amendments will state that Aboriginal peoples have an inherent right to self-government within Canada. This statement of the right is important. It acknowledges the source of the right as pre-existing the Canadian constitution, arising instead from the historical fact of the existence of aboriginal communities as self-governing.

This amendment also acknowledges aboriginal government as being an order of government that is constitutionally recognized, not one that has delegated power to make laws as do municipalities, for example. However, the inclusion of the right in the Constitution does not create any new aboriginal rights to land.

Aboriginal Legislative Authority

The legislative bodies of Aboriginal peoples (that is, those governmental institutions developed within aboriginal communities that are similar to legislatures in the case of provinces) will have authority to make laws. That authority will include the jurisdiction to make laws to safeguard and develop the languages, cultures, economies, identities, institutions and traditions of Aboriginal peoples as well as to develop, maintain and strengthen the relationship between Aboriginal peoples and their lands, waters and environment.

In addition, aboriginal laws will be required to serve the ultimate purpose of allowing Aboriginal peoples to determine and control their development as peoples according to their own values and priorities and to ensure the integrity of their societies.

The scope of the inherent right to self-government, and therefore the precise range of legislative authority available to aboriginal legislative bodies, will also be constrained by other constitutional provisions. These constraints include the very existence of the right within the Canadian Constitution and its relationship to other aspects of the Constitution, especially the existence of the federal and provincial governments.

The *Canadian Charter of Rights and Freedoms* will apply to aboriginal governments in the same way that it now applies to the federal and provincial governments. As one consequence, aboriginal governments will be able to enact laws "notwithstanding" certain Charter rights. To do this, the aboriginal government must demonstrate public support in its community for the elevation of the collective good over Charter rights. As with the federal and provincial governments, such an enactment "notwithstanding" the Charter would expire after five years.

It also means that section 28, which states that the rights guaranteed in the Charter are guaranteed equally to women and men, applies to aboriginal governments in the same way that it now applies to the federal and provincial governments.

Relationship with Federal and Provincial Laws

Federal and provincial laws will continue to apply to Aboriginal peoples until they are displaced by validly enacted aboriginal laws. Thus, an aboriginal law will only be able to supplant federal and provincial laws if the aboriginal law meets three basic criteria: (1) it must be enacted, so traditional laws or customs cannot override federal and provincial laws unless they are specifically enacted; (2) it must be a law made by an aboriginal legislative body, so the law must emanate from an institutional authority; and (3) it must be made within the scope of its legislative authority as set out in the Constitution, so the law must be enacted to achieve the objectives described earlier.

In addition, even aboriginal laws that meet all three of these criteria might be inoperative if they conflict with a federal or provincial law that is essential to the preservation of peace, order and good government in Canada.

Justiciability Delay

The inherent right to self-government will not be justiciable for a period of five years after the constitutional amendments are made — that is, it will not be capable of being enforced or interpreted through the courts for five years. (Under the 1982 Amending Formula, amendments are brought into effect after Parliament and the legislatures of the provinces have passed the appropriate resolutions for constitutional change and the resolutions have been proclaimed in force by the Governor General.)

The most important reason for this delay is to permit all governments — federal, provincial and aboriginal — to negotiate self-government agreements. During this delay neither aboriginal governments nor federal or provincial governments will be able to turn their backs on negotiations and run to the courts.

Also, during this delay, individuals will not be able to raise the right of self-government in a courtroom as a reason why a federal or provincial law should not apply to them. And after the expiration of the five-year delay period, whether or not a self-government agreement is reached, the existence of aboriginal laws will not necessarily mean that an Aboriginal person is not also subject to other federal and provincial laws. (This is explained further later on.)

Self-Government Agreements

All governments will be committed to engaging in good faith negotiations to conclude self-government agreements. These agreements will articulate in detail the nature of the relationships between and among governments. Negotiations will begin when the proper representatives of the Aboriginal peoples request other governments to begin the negotiations.

The detailed process of how negotiation will take place will be contained in a political accord that accompanies the constitutional amendments (a political accord contains political commitments made by governments to one another, as opposed to legal obligations). The political accord will address important issues such as, what is an aboriginal government, who are the proper representatives of Aboriginal peoples and how are disputes resolved.

Dispute resolution will occur through mediation, arbitration and facilitation rather than in the usual adversarial procedure used in courts.

The political accord will be developed before the constitutional amendments become effective. These questions, and the process of alternative dispute resolution, are critical to the success of self-government negotiations and the agreements that are reached as a result of them.

All Aboriginal peoples will have equitable access to self-government negotiations.

Self-government negotiations will recognize and take account of the differing circumstances of Aboriginal peoples throughout the country. So the face of self-government will be different in different places and amongst different Aboriginal peoples.

These latter two points implicitly acknowledge that self-government can exist with or without land. Indeed, this idea connects back with the recognition of the inherent right as a right belonging to all Aboriginal peoples, not just those with land.

Negotiations are the crux of self-government. The constitutional amendments and the political accords that will accompany them are designed to make it more attractive for everyone to negotiate rather than to litigate. When, after the end of the five-year delay on justiciability, issues of self-government arise in courts, the court will be required to look into the efforts the parties have made to negotiate an agreement and will be able to order them to go away and negotiate rather than continuing the litigation.

Once a self-government agreement is completed, it will articulate, in some detail, within the framework provided by the Constitution, the scope of the legislative authority of a particular aboriginal government, of a particular Aboriginal people, in a particular place. It will also set out the nature of the relationship between that aboriginal government and the federal and provincial governments with which it must interact.

Treaties

The constitutional amendments will include a provision relating to treaties and their implementation. The provision will include a statement directing the courts to interpret treaties in a "just, broad and liberal manner" while taking into account their spirit and intent and the context in which the treaties were originally negotiated. This language captures the decisions of the Supreme Court of Canada in a number of recent cases involving the interpretation of treaties.

The treaty provision will also commit the federal government to establishing and participating, in good faith, in a process of clarification and implementation of treaty rights. Changes in the written text of the treaties will be possible only where both parties agree with the changes.

Provincial governments would also be committed to participation in the treaty implementation process where they are invited to do so by both the federal government and the Aboriginal peoples concerned.

All Aboriginal peoples who have treaty rights would have equitable access to the treaty implementation process.

The treaty provision cannot be used to argue that the authority of a federal or provincial government is somehow extended, nor can specific treaty implementation negotiations affect the treaty rights of other Aboriginal peoples.

The Métis

A new provision in the Constitution will ensure that section 91(24) of the *Constitution Act, 1867* includes the Métis. Section 91(24) currently provides that "Indians, and Lands reserved for the Indians" are a matter within the exclusive legislative jurisdiction of the federal Parliament. The courts have interpreted this provision as relating also to "Inuit", but its extension to the Métis has been doubtful. This amendment will remove any doubt.

The amendment will simply clarify that Métis fall within the scope of the federal jurisdiction as set out in section 91(24). It will not oblige the federal government to act to exercise that authority.

A special provision will accompany the amendment to protect the legal status of the Métis Settlement Lands in Alberta and the Alberta legislation relating to them.

The federal government, the governments of Ontario, Manitoba, Saskatchewan, Alberta and British Columbia and the Métis National Council will also sign a Métis Accord. It will ensure that the mere fact that section 91(24) will be amended to include the Métis does not lead either the federal or provincial governments to take action reducing their existing financial commitments to Aboriginal peoples of all kinds.

The Accord will also commit governments to negotiating self-government agreements with the Métis and to engaging in a Métis enumeration.

Aboriginal Constitutional Conferences

The Constitution will provide for at least four future First Ministers' Conferences on Aboriginal Constitutional Issues. The first such conference must be held no later than 1996 and the remaining three must be held at intervals of no more than two years. The agenda at these conferences will be those items put forward from this round of constitutional negotiations and any others that are identified by the Aboriginal peoples. The aboriginal constitutional conferences will be held in addition to any others held by First Ministers.

Aboriginal Involvement in Central Institutions

The Charlottetown Agreement recognizes a commitment by all participants to a guarantee of aboriginal representation in the Senate. This guarantee is based on the constitutional recognition of an aboriginal order of government. Aboriginal Senators will have the same role and powers as other Senators. As well, it may be appropriate that aboriginal Senators should have a double majority power in relation to matters affecting Aboriginal peoples.

The Charlottetown Agreement acknowledges the principle of aboriginal representation, but no other details have yet been concluded. All participants agreed that these matters would be resolved in further discussions to be held in the fall of 1992.

While no changes in the composition of the Supreme Court of Canada are proposed in these amendments, a political accord will articulate the role of Aboriginal peoples in this regard.

In particular, the provincial and territorial governments will be expected to develop a reasonable process for consultation with Aboriginal peoples in preparing lists of candidates to fill vacancies on the Supreme Court. Aboriginal groups will be able to continue to make such representations directly to the federal government, as well. And the federal government will explore further the proposal that an Aboriginal Council of Elders be entitled to make submissions to the Supreme Court when the court considers aboriginal issues.

The issue of aboriginal representation in the House of Commons will be explored further after the final report of the Commons Committee that is studying the recommendations of the Royal Commission on Electoral Reform and Party Financing (Lortie Commission).

Aboriginal Protection Mechanism

A general non-derogation clause will ensure that the amendments in relation to the division of powers between federal and provincial governments will not adversely affect the rights of Aboriginal peoples or the jurisdiction and powers of aboriginal governments.

Aboriginal Consent to Constitutional Change Affecting Aboriginal Rights

Any change in any provision of the Constitution that directly refers to Aboriginal peoples will require the consent of the Aboriginal peoples. The precise mechanism by which this consent will be achieved is yet to be decided.

All participants acknowledge that not every aboriginal government should necessarily be entitled to a status similar to that of provincial legislatures in regard to constitutional amendment. It is possible that hundreds of such governments might eventually exist.

It is therefore necessary to determine some method by which it can be said Aboriginal peoples have consented to a proposed change without making the process of constitutional change even more unworkable than it might already be.

The Canada Clause

The Canada Clause directs the courts to interpret the whole of the Constitution against the background of the fundamental characteristics set out in it. One of these fundamental characteristics pertains to Aboriginal peoples.

Thus, the understanding of all provisions of the Constitution will be shaped by the acknowledgement that the governments of Aboriginal peoples have the right to promote their languages, cultures and traditions and to ensure the integrity of their societies as one of three orders of government in Canada.

Canada's Social and Economic Union

Although Canada has ratified various international human rights conventions which provide for basic social, political, cultural, and economic rights, these commitments do not now form part of our Constitution.

The Special Joint Committee on a Renewed Canada (the Beaudoin-Dobbie Committee) recommended the inclusion of a social and economic covenant in the Constitution. The Charlottetown Agreement in large part incorporates the findings of the Beaudoin-Dobbie Committee.

Social and Economic Union

A new provision, called the Social and Economic Union, will describe the commitment of federal and provincial governments to the preservation and development of Canada's social and economic union. All governments will be committed to a list of policy objectives.

The policy objectives set out in the social union include, but are not limited to:

- providing throughout Canada a health care system that is comprehensive, universal, portable, publicly administered, and accessible;
- providing adequate social services and benefits to ensure that all individuals resident in Canada have reasonable access to housing, food, and other basic necessities;
- providing high quality primary and secondary education to all individuals resident in Canada and ensuring reasonable access to post-secondary education;
- protecting the rights of workers to organize and bargain collectively; and
- protecting, preserving, and sustaining the integrity of the environment for present and future generations.

The policy objectives set out in the economic union include, but are not limited to:

- working together to strengthen the Canadian economic union;
- the free movement of persons, goods, services, and capital;
- the goal of full employment;
- ensuring that all Canadians have a reasonable standard of living; and
- ensuring sustainable and equitable development.

Some care has been taken to ensure that duly elected governments, and not the courts, retain the authority to decide upon the best way of fulfilling these commitments.

First, a future First Ministers' Conference will design and establish a mechanism for monitoring governments' success at achieving the policy objectives set out in the social and economic union.

Second, the fact that the commitments of governments are described as "policy objectives" is intended to show that these provisions are not "justiciable", that is, that judges should not rule on them.

Regional Development

The Constitution will contain new provisions concerning regional development and the reduction of economic disparities in Canada. Special measures to foster economic development in the less-developed regions of the country will strengthen the Canadian economy as a whole.

First, the Constitution will commit the federal and provincial governments to providing "reasonably comparable economic infrastructure of a national nature in each province and territory". Infrastructure, while not specifically defined, could include communications networks, energy pipelines, and transportation systems such as highways and railroads.

The Atlantic provinces, in particular, believe that improvements to infrastructure will rebuild ties with Canada and reduce economic disparities between them and the rest of Canada.

Second, the Constitution will commit governments to the promotion of regional economic development to reduce economic disparities. This provision is a compromise between provinces who want regional development recognized as an area of exclusive provincial jurisdiction and those who want a strong commitment by the federal government to promote regional economic development.

Regional development will not become a new head of power in the Constitution. Instead, both federal and provincial governments are committed to the promotion of regional economic development to reduce disparities. Governments will achieve their objectives through intergovernmental agreements designed to meet the special needs and circumstances of each province. The federal government must negotiate, within a reasonable period of time, a regional development agreement at the request of any province.

Equalization

Equalization is a fiscal arrangement between the federal and provincial governments. The federal government gives less affluent provinces revenues to help pay for public services. The federal money ensures that all citizens enjoy reasonably comparable levels of services at reasonably comparable levels of taxation, regardless of where they live in Canada.

The equalization program is one of the fundamental principles of the Canadian federation.

The Charlottetown Agreement will amend the Constitution so as to strengthen the federal government's commitment to making equalization payments. Thus, all provincial governments will have sufficient revenues to provide reasonably comparable levels of public service at reasonably comparable levels of taxation.

In addition, the federal government will be constitutionally required to seek the views of the provinces before establishing an equalization formula. This consultation will ensure that the provinces have a more active role in the development of equalization arrangements.

The Common Market — Reduction of Interprovincial Trade Barriers

Section 121 of the current Constitution says that goods produced in one province must be admitted free into other provinces. The courts have interpreted section 121 to mean that no government can erect customs duties or tariffs between provinces.

However, this section does not guarantee mobility of goods and does not deal at all with services, capital, or labour. Section 6 of the *Canadian Charter of Rights and Freedoms* does provide some guarantee that Canadians and permanent residents of Canada have access to employment in any province. Provincial laws may give preference to provincial residents in provinces where the rate of employment is below the national average.

The federal government proposed a constitutional prohibition against any contravention of the principle of free movement of goods, persons, services, and capital.

Saskatchewan believed that the federal proposal would have given the courts too much responsibility for managing many key aspects of the economy. In other words, to place this provision in the Constitution would result in the courts, as opposed to governments, deciding important matters of public and economic policy.

A compromise was reached in Charlottetown. There will not be a new constitutional provision. Rather, a political accord will state in detail the principles and commitments relating to the removal of trade barriers within Canada. The First Ministers will review these principles at a future First Ministers' Conference on the economy and decide on the best method of implementing these principles. The First Ministers may also, if they wish, create an independent agency to resolve disputes about trade barriers.

Division of Powers

Canada was created in 1867 as a federation in which governmental powers were divided between a central government and the governments of the provinces. This division of powers is defined primarily in the *Constitution Act, 1867*. The federal Parliament and government have powers that were thought necessary for the preservation of national interests. Provincial legislatures and governments have powers over matters that were believed in 1867 to be of greater local or regional concern.

The Charlottetown Agreement contains no provisions which devolve or transfer federal powers to the provinces, with the exception of some aspects of unemployment insurance. Instead, a substantial portion of the division of powers package seeks to restrain the federal government's use of its spending power.

The Federal Spending Power

The federal Parliament can pass laws only in relation to the subject areas assigned to it by the Constitution. However, it can spend its money as it likes. The federal spending power refers to the federal government's ability to spend money, a power not expressly mentioned in the Constitution.

The federal spending power includes spending by the federal government in areas of exclusive provincial jurisdiction such as health care, education, or social services. It is exercised through instruments such as direct payments, grants, loans, subsidies, tax breaks, transfers in kind, and pilot projects to governments, individuals, corporations or organizations. In return for this financial assistance, the federal government often insists upon the right to set program standards.

The Charlottetown Agreement contains two specific provisions with respect to the federal spending power. Constraints on the federal spending power are also included in amendments about the recognition of areas of exclusive provincial jurisdiction, culture, and labour market development and training, which are described in greater detail below.

New Canada-Wide Shared-Cost Programs:

The federal spending power in this area has often been regarded as heavy-handed and intrusive of provincial jurisdiction. At the same time, however, shared-cost programs have made possible some of our greatest social achievements, such as medicare for all Canadians.

The Charlottetown Agreement attempts to strike a balance between provincial jurisdiction over social programs and the benefits of national programs. A new constitutional provision will state that the Government of Canada must provide reasonable compensation to the government of any province that chooses not to participate in a new Canada-wide shared-cost program established by the federal government in an area of exclusive provincial jurisdiction. However, that province must carry on a program or initiative that is compatible with national objectives in order to receive compensation.

Framework:

First Ministers will develop a framework at a future conference to limit the use of the federal spending power in all areas of exclusive provincial jurisdiction.

The framework will ensure that the federal spending power can only be used in areas of exclusive provincial jurisdiction if it:

- contributes to the pursuit of national objectives;
- reduces overlap and duplication of services and programs;
- respects and not distorts provincial priorities; and
- ensures equality of treatment of provinces while recognizing their different needs and circumstances.

These limits on the federal spending power, however, will not affect commitments to equalization.

Once developed, the framework can form the basis of agreements between the federal government and one or more provinces. These agreements could be protected from unilateral changes using the intergovernmental agreements mechanism described below.

Intergovernmental Agreements

The new constitutional provision for the protection of intergovernmental agreements is one of the most important features of the division of powers amendments.

Specifically, the Constitution will ensure that designated agreements between federal and provincial governments are protected from unilateral change. To receive protection, the federal Parliament and the provincial legislature(s) must enact laws approving an agreement, thus ensuring that the mechanism is used in an open manner. The agreement can then only be changed in accordance with its terms or by a further agreement approved using the same procedure.

Each application of the mechanism will last a maximum of five years, although Parliament and the legislature(s) can vote to adopt again the legislation.

This provision can be used in a wide variety of circumstances, particularly with respect to federal-provincial fiscal and spending power arrangements. However, it cannot be used to authorize the transfer or delegation of authority to make laws. The federal government has indicated that it intends to apply this mechanism to future agreements about the Canada Assistance Plan (under the Canada Assistance Plan, the federal government cost-shares on a 50/50 basis each province's income maintenance and social service programs).

The provision will be available to protect both bilateral and multilateral agreements among federal, provincial, and territorial governments, and the governments of Aboriginal peoples. The governments of Aboriginal peoples will also have full access to this mechanism.

Where one province has obtained a protected agreement, another province can require the federal government to:

- negotiate and conclude an agreement with it in a reasonable period of time;
- with respect to terms and conditions, accord equality of treatment in the context of different needs and circumstances of the provinces; and
- place the agreement before Parliament so that it can also obtain protection from unilateral change.

The Six Sectors

The Constitution will recognize and clarify exclusive provincial jurisdiction in six policy sectors.

These sectors are:

- tourism
- forestry
- mining
- recreation
- housing
- municipal/urban affairs

Provinces already have primary legislative authority in the six sectors. Hence, this proposal does not involve any actual transfer or devolution of jurisdiction from the federal government to the provinces. Rather, the goals of this proposal are to affirm provincial jurisdiction and to constrain the federal government's ability to use its spending power in the six sectors.

It should be emphasized that some provinces do not want to see a withdrawal of federal spending in these sectors. For these provinces, a safeguard provision obliges the federal government to negotiate an agreement to maintain its spending in any area when requested to do so by a province.

The Charlottetown Agreement contains the following provisions concerning the six sectors:

- exclusive jurisdiction over the six areas will be recognized and clarified through an explicit constitutional amendment;
- provincial legislatures will have the authority to constrain federal spending that is directly related to these areas, which will be accomplished through court enforceable intergovernmental agreements (using the binding intergovernmental agreements mechanism) designed to meet the specific circumstances of each province;
- intergovernmental agreements will set the terms for federal withdrawal, including the level and form of financial resources to be transferred to the provinces (in addition, a political accord will specify the form the compensation would take, that is, cash transfers, tax points, or something else);
- alternatively, an intergovernmental agreement could require the federal government to maintain its spending in that province;
- a provincial government negotiating an intergovernmental agreement will be accorded equality of treatment with respect to terms and conditions of agreements in relation to any other province that has already concluded an agreement, taking into account the different needs and circumstances of the provinces;
- the federal government will be required to negotiate and conclude intergovernmental agreements within a reasonable time;
- service to the public in both official languages could be part of such agreements; and
- these changes do not alter the special trust relationship between the federal government and Aboriginal peoples.

Culture

The Constitution will state that provinces have exclusive jurisdiction over cultural matters within provinces.

However, this amendment will also recognize the continuing responsibility of the federal government in Canadian cultural matters. Thus, the federal government retains responsibility for national cultural institutions, including grants and contributions delivered by these institutions.

The Charlottetown Agreement also commits the federal government to negotiate cultural agreements with any provinces in recognition of the province's lead responsibility for cultural matters within the province and to ensure that the federal government and the province work in harmony.

These amendments will not alter the fiduciary or special trust relationship between the federal government and Aboriginal peoples. Nor will these changes derogate from the rights of Aboriginal peoples and the jurisdictions and powers of their governments.

Labour Market Development and Training

The Constitution will recognize labour market development and training as an area of exclusive provincial jurisdiction.

At the same time, the Constitution will state clearly that the federal government retains exclusive responsibility for unemployment insurance, and for the income support and related services delivered through the unemployment insurance system.

By virtue of this amendment, provincial legislatures will have the authority to constrain federal spending that is directly related to labour market development and training. Constraint will be accomplished through intergovernmental agreements designed to meet the circumstances of every province. Courts will enforce the agreements.

Not all provinces may want the federal government to withdraw from labour market development and training. As a safeguard for those provinces, the federal government will be required to negotiate and conclude agreements to maintain its responsibility for labour market programs and activities in those provinces. Provinces negotiating an agreement will have equality of treatment with respect to terms and conditions of agreements signed with any other province and the federal government, taking into account the different needs and circumstances of each province.

Safeguards will ensure that the federal government continues to play a significant role in national labour market programs. The federal government will commit itself in a political accord to enter into administrative agreements with the provinces with a view to improving the efficiency and client services of federal unemployment insurance and provincial employment functions.

Another constitutional provision will ensure an ongoing federal role in the establishment of national policy objectives for the national aspects of labour market development. Finally, provinces that have negotiated agreements to constrain federal spending are obliged to ensure that their labour market development programs are compatible with the national policy objectives, although they will be able to design programs which are compatible with their different needs and circumstances.

Immigration

Immigration is one of the two subjects which the current Constitution assigns to both the federal Parliament and the provincial legislatures. However, if the two levels of government pass conflicting legislation, the federal legislation prevails.

A new provision imposes on the federal government an obligation to negotiate an immigration agreement with any province. These agreements must be negotiated within a reasonable period of time.

These agreements will obtain a constitutional status if they are ratified by resolutions of the House of Commons and the Senate, and the legislature of the province concerned. Thus, the agreements cannot be changed by unilateral federal action, and can be amended only by the same process — that is by joint resolution of Parliament and the provincial legislature. The *Canadian Charter of Rights and Freedoms* will continue to apply to these agreements, and actions carried out pursuant to them.

The federal government will maintain responsibility for citizenship, and will continue to set national standards and objectives relating to immigration and immigrants.

Finally, in line with the principle of the equality of the provinces, a clause stipulates that a province negotiating an immigration agreement should be accorded equality of treatment in relation to any other province which has already concluded an agreement, taking into account the different needs and circumstances of the provinces.

Telecommunications

Saskatchewan's preference in the general area of telecommunications is for provincial control over aspects of telecommunications within the province. However, Saskatchewan recognizes a legitimate and necessary role for the federal government in those aspects of telecommunications that have clearly international or extra-provincial dimensions.

At the same time, Saskatchewan has always regarded SaskTel as a tool for economic development, and not simply a telecommunications carrier.

The Charlottetown Agreement commits the federal government to negotiating agreements with the provincial governments to coordinate and harmonize the procedures of their respective regulatory agencies in this field. These agreements can be protected from unilateral change under the mechanism for protection of intergovernmental agreements.

Aboriginal Peoples' Protection Mechanism

The Charlottetown Agreement provides for a general non-derogation clause in the Constitution. It will ensure that the division of powers amendments will not adversely affect the rights of Aboriginal peoples and the jurisdictions and powers of governments of Aboriginal peoples. Nothing in the constitutional agreement will be able to take away from the federal authority to legislate with respect to Indians and lands reserved for Indians contained in section 91(24) of the *Constitution Act, 1867.*

Another provision states the constitutional agreement does not take away from Aboriginal, treaty, or other rights and freedoms that pertain to Aboriginal peoples.

Finally, the mechanism for the protection of intergovernmental agreements will be available to aboriginal governments to protect agreements among the federal, provincial and territorial governments, and the governments of Aboriginal peoples.

Federal Declaratory Power

The Constitution permits Parliament to declare, unilaterally, a "work" to be for the general advantage of Canada or of two or more provinces, and to bring the work under the legislative jurisdiction of Parliament.

Parliament has used the federal declaratory power quite extensively in the past, more than 470 times. For example, the declaratory power was used to ensure federal jurisdiction over the railway system, the grain trade, atomic energy, BCTel, and Bell Canada.

Many provinces have criticized the federal declaratory power because it enables Parliament to increase its powers unilaterally at the expense of provincial legislatures. Alberta, during the energy crisis, called for restrictions over this power because the province feared that the federal government would use it to gain control over oil and gas production and transportation.

The Charlottetown Agreement ensures that Parliament can only apply the declaratory power to new works, or rescind past declarations with the explicit consent of the province(s) in which the work is situated. Existing declarations will be left undisturbed unless all affected legislatures wish to take action.

Federal Power of Disallowance and Reservation

The Constitution contains two federal powers at odds with modern principles of government: disallowance and reservation of provincial laws.

Disallowance and reservation are different powers. The power of disallowance nullifies a provincial law. Only the Governor General may exercise this power. The power of reservation holds a provincial Bill in limbo until the Governor General decides either to assent to it or not.

These powers have not been used for some time. The last example of federal disallowance of provincial legislation occurred in 1943. The last example of reservation of a provincial bill was in 1961 in Saskatchewan.

The exercise of these powers does not even need a legal reason. A legitimate provincial Bill or enactment may be reserved or disallowed for purely political reasons.

The federal powers of disallowance and reservation are viewed by many as being inconsistent with the principles of federalism, since they assume a subservient role for provinces in relation to the federal government even when the provinces are acting within their exclusive jurisdiction.

The Charlottetown Agreement will repeal this provision of the Constitution. Repeal requires the support of Parliament and the legislatures of all of the provinces.

The Amending Formula

The demand for constitutional reform has prompted some Canadians to question the requirements that must be met in order to amend the Constitution. An appropriate balance must be found between flexibility in amendment procedures on the one hand, and constitutional stability on the other.

To amend the Constitution, in most cases, the approval of Parliament and the legislatures of seven provinces with 50% of the population (7/50) is needed. However, there are some exceptions, such as changes to the amending formula itself, which require the unanimous agreement of Parliament and the legislatures of all of the provinces.

The Charlottetown Agreement contains some specific changes to the constitutional amending formula. Except as noted below, however, the general rule (7/50) remains as the basic amending formula.

Changes to National Institutions

The Charlottetown Agreement provides that once the reformed Senate is put into place, any future changes to the Senate will require the approval of the federal Parliament and the legislatures of all of the provinces. Future changes to the House of Commons will also require unanimity. This gives all provinces a veto over future changes to the reformed Senate and the House of Commons.

Changes to the nomination and appointment process for Supreme Court of Canada judges will remain a 7/50 matter. It will require the agreement of Parliament and the legislatures of seven provinces representing at least 50% of the population.

Changes to all other matters related to the Supreme Court of Canada, including its role as the general court of appeal and its composition, will require the consent of Parliament and the legislatures of every province. Thus, once again, every province will have a veto.

Establishment of New Provinces

The Charlottetown Agreement will replace the current 7/50 formula for the creation of new provinces. Territories will become new provinces through an agreement with the federal government, after consultation with all existing provinces at a First Ministers' Conference.

These new provinces will not have a role in the amending formula without the consent of Parliament and the legislatures of all of the provinces, except for issues which apply only to the new provinces, or the federal government and the new province.

New provinces will not receive any additional Senators without the consent of Parliament and all of the provinces. However, territories that become new provinces cannot lose Senators or members of the House of Commons.

Compensation for Amendments That Transfer Jurisdiction

The Charlottetown Agreement states that when legislative powers are transferred from provincial legislatures to Parliament, the federal government will provide reasonable compensation to any province that opts-out of the amendment.